

11-4643(L)  
In Re: Ambac Fin. Grp.

# MANDATE

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

1:08-cv-00411-NRB

## SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals  
 2 for the Second Circuit, held at the Daniel Patrick Moynihan  
 3 United States Courthouse, 500 Pearl Street, in the City of  
 4 New York, on the 12<sup>th</sup> day of July, two thousand twelve.

5 PRESENT: DENNIS JACOBS,  
 6 Chief Judge,  
 7 DENNY CHIN,  
 8 SUSAN L. CARNEY,  
 9 Circuit Judges.  
 10 - - - - -

USDC SDNY  
 DOCUMENT  
 ELECTRONICALLY FILED  
 DOC #: \_\_\_\_\_  
 DATE FILED: August 3, 2012

11 IN RE: AMBAC FINANCIAL GROUP, INCORPORATED  
 12  
 13 PUBLIC SCHOOL TEACHERS' PENSION & RETIREMENT  
 14 FUND OF CHICAGO, ARKANSAS TEACHERS RETIREMENT  
 15 SYSTEM, PUBLIC EMPLOYEES' RETIREMENT SYSTEMS  
 16 OF MISSISSIPPI, SCOTT REIMER, individually and  
 17 on behalf of all others similarly situated,  
 18 STANLEY TOLIN, EDWARD WALTON, PAINTING  
 19 INDUSTRY INSURANCE AND ANNUITY FUNDS, MARKO  
 20 BABIC, KEVIN PARKER, individually and on  
 21 behalf of all others similarly situated,  
 22 MINNEAPOLIS FIREFIGHTERS' RELIEF ASSOCIATION,  
 23 on behalf of itself and all others similarly  
 24 situated,  
 25 Plaintiffs-Appellees,

POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY  
OF DETROIT,  
Plaintiff-Appellant,

-v.- 11-4643 (Lead)  
12-59 (Con)

AMBAC FINANCIAL GROUP, INC., ROBERT J.  
GENADER, PHILLIP B. LASSITER, SEAN T. LEONARD,  
THOMAS J. GANDOLFO, JOHN W. UHLEIN, III, DAVID  
W. WALLIS, MICHAEL A. CALLEN, JILL M.  
CONSIDINE, W. GRANT GREGORY, THOMAS C.  
THEOBALD, LAURA S. UNGER, HENRY WALLACE,  
PHILIP N. DUFF, BANC OF AMERICA SECURITIES,  
LLC, CITIGROUP GLOBAL MARKETS INC., GOLDMAN,  
SACHS & CO., HSBC SECURITIES (USA) INC., J.P.  
MORGAN SECURITIES INC., MERRILL LYNCH, PIERCE,  
FENNER & SMITH INCORPORATED, UBS SECURITIES  
LLC, WACHOVIA CAPITAL MARKETS, LLC,  
Defendants-Appellees

BANC OF AMERICA SECURITIES, LLC, CREDIT SUISSE SECURITIES USA LLC, KEEFE, BRUYETTE & WOODS, INC., KPMG LLP,  
Defendants.

UNITED STATES TRUSTEE,  
Trustee.

**FOR APPELLANT:** Denis F. Sheils (Barbara L. Moyer, on the brief), Kohn, Swift & Graf, P.C., Philadelphia, Pa.

**FOR APPELLEES:** Rochelle Feder Hansen (Steven B. Singer, Niki L. Mendoza, on the brief), Bernstein Litowitz Berger & Grossmann LLP, Frederic S. Fox, Kaplan Fox & Kilsheimer LLP, on the brief, New York, N.Y. (Counsel for Public School

Teachers' Pension & Retirement Fund of Chicago, Arkansas  
Teachers Retirement System and  
Public Employees' Retirement  
System of Mississippi),

Peter C. Hein (C. Lee Wilson, on the brief), Wachtell, Lipton, Rosen & Katz, New York, N.Y. (Counsel for Ambac Financial Group, Inc. and the individual Defendants-Appellees), Richard Reinthaler, Winston & Strawn LLP, on the brief, New York, N.Y. (Counsel for Ambac Financial Group, Inc.).

Consolidated appeals from judgments of the United States District Court for the Southern District of New York (Buchwald, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of the district court be AFFIRMED.

Police and Fire Retirement System of the City of Detroit ("PFRS") appeals from: (1) the September 28, 2011, judgments of the District Court approving, pursuant to Federal Rule of Civil Procedure 23(e), a settlement between Ambac Financial Group and plaintiffs in consolidated shareholder class actions, and (2) the December 29, 2011, judgment of the District Court affirming the Bankruptcy Court's order approving the settlement pursuant to Bankruptcy Rule 9019. As part of the settlement, Ambac released any claims that could be brought on its behalf against its officers and directors. PFRS, a nominal plaintiff in a shareholder derivative action, argues that Ambac lacked authority to release the derivative claims.

"[T]he filing of [a] bankruptcy petition immediately alter[s] the rights of the [c]orporation and the manner in which its rights [can] be asserted." Mitchell Excavators, Inc. v. Mitchell, 734 F.2d 129, 131 (2d Cir. 1984). "[W]hile normally the fiduciary obligation of officers,

1       directors and shareholders 'is enforceable directly . . . .  
 2       through a stockholder's derivative action, it is, in the  
 3       event of bankruptcy of the corporation, enforceable by the  
 4       trustee'" or debtor-in-possession.<sup>1</sup> Id. (quoting Pepper v. Litton, 308 U.S. 295, 307 (1939)). Accordingly, when Ambac  
 5       filed for bankruptcy, the derivative claims became property  
 6       of the debtor-in-possession, Ambac.

8       "[U]nder certain circumstances a shareholder may assert  
 9       a cause of action of the debtor even after the commencement  
 10      of a bankruptcy proceeding. For example, the trustee may  
 11      abandon a particular claim, making it possible for others to  
 12      assert it. Also, the bankruptcy court may order the trustee  
 13      to abandon a claim." Id. (citations omitted). The  
 14      bankruptcy court never ordered Ambac to abandon the  
 15      derivative claims and found that PFRS never petitioned for  
 16      such an order, a finding PFRS challenges only in its reply  
 17      brief. See United States v. Yousef, 327 F.3d 56, 115 (2d  
 18      Cir. 2003) ("We will not consider an argument raised for the  
 19      first time in a reply brief."). PFRS argues that Ambac  
 20      unilaterally abandoned the claims by agreeing to their  
 21      release. But in cases of abandonment, "some proceeding in  
 22      the bankruptcy court must take place before a shareholder  
 23      can assert the right directly." Mitchell, 734 F.2d at 132;  
 24      see also 11 U.S.C. § 554(a)-(b) ("After notice and a  
 25      hearing, the trustee may abandon any property of the estate  
 26      . . . . On request of a party in interest and after notice  
 27      and a hearing, the court may order the trustee to abandon  
 28      any property of the estate . . . ."). Moreover, Ambac  
 29      released the claims as part of a settlement with (inter  
 30      alia) its directors' and officers' liability insurers, who  
 31      had asserted that they were unwilling to pay absent the  
 32      release. Accordingly, the derivative claims belong to the  
 33      Ambac estate and PFRS lacks a cognizable interest in their  
 34      release. See Sobchack v. Am. Nat'l Bank & Trust Co. of  
 35      Chicago (In re Ionosphere Clubs, Inc.), 17 F.3d 600, 604 (2d  
 36      Cir. 1994) ("[T]he claims submitted by the [shareholders] to  
 37      the bankruptcy court are derivative . . . . They therefore

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<sup>1</sup> "[D]ebtors-in-possession and reorganization trustees have essentially the same rights, powers, and duties." Kalb, Voorhis & Co. v. Am. Fin. Corp., 8 F.3d 130, 132 n.1 (2d Cir. 1993) (citing 11 U.S.C. § 1107(a)).

1 belong exclusively to the [debtor's] Estate and were  
2 extinguished by its settlement of those claims.").

3 Having concluded that PFRS lacks an interest in the  
4 derivative claims, we need not consider the other arguments  
5 it raises. Accordingly, we hereby **AFFIRM** the judgments of  
6 the district court.

7 FOR THE COURT:  
8  
9

10 CATHERINE O'HAGAN WOLFE, CLERK  
11  
12

  


A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit



